84-627

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY COUNCIL OF THE CITY OF CHICAGO,
Petitioner,

v.

MARS KETCHUM, et al.,
Respondents,

and

CHARMAINE VELASCO, et al.,
Respondents,

and

POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit's decision violate the expressed intent of Congress in enacting Section 2 of the Voting Rights Act, as amended, *i.e.*, to provide members of the protected class with the same opportunity as others within the political unit to participate in the electoral process and to elect a representative of their choice, and not to guarantee the election of a member of the minority group, in failing to give "special deference" to the district court's redistricting plan and in remanding the case to the district court to fine-tune the plan to increase the super-majority of minority population within six wards even beyond a 50% voting age population to provide "effective" majorities?

2. Did the Seventh Circuit's Amended Opinion fail to give special deference, as required by this Court's decisions (see *White v. Regester*, 412 U.S. 755, 769 (1973) and *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)), and as followed in other circuits (see *Washington v. Finlay*, 664 F.2d 913, 920 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982)), to the district court's finding that in the wards in question in the City of Chicago the protected minority need only constitute 50% of the individual ward's voting age population in order to constitute an "effective" majority within the meaning of Section 2 of the Voting Rights Act, as amended?

3. Did the Seventh Circuit's Amended Opinion fail to give special deference to the district court's redistricting plan for the fifty wards of the City of Chicago, which provides for 19 wards with a black majority voting age population and 4 wards with an Hispanic majority voting age

population, in reversing and remanding the case with directions that the district court fashion a suitable remedy of "effective" black and Hispanic majorities in at least the identical number of wards, *i.e.*, 19 wards with a majority black population and 4 wards with a majority Hispanic population?

4. Does the Seventh Circuit's Amended Opinion bring such substantial confusion to the decisions in the area of redistricting and is it so inconsistent with the "totality of circumstances" standard mandated by Congress in Section 2 of the Voting Rights Act, as amended, and with the "objective" factors to be considered in the process as identified by the Senate Report, as to warrant this Court's intervention where, for example, the Amended Opinion requires the district court on remand to take additional evidence, primarily statistical, on current minority voter registration and turnout almost five years after the census, and, based directly upon such data, the district court may decide to adopt a "corrective" based directly on these statistics or "some other uniform corrective such as the widely accepted 65% guideline"?

5. Are Hispanic persons within an Hispanic ward legally entitled under Section 2 of the Voting Rights Act, as amended, to an even greater enhancement of their super-majority status within a ward which is significantly made up of Hispanic non-citizens?

PARTIES TO THE PROCEEDINGS

The Ketchum plaintiffs include: Mars Ketchum, Suzanne Newhouse, Marlene Carter, Lewis J. White, Joseph Gardner, Lu Palmer, A.A. Rayner, Jr., Danny K. Davis and Allan Streeter.

The Velasco plaintiffs include: Charmaine Velasco, Abel Del Toral, Maria Alma Alvarado, David Perez, Idalia Hernandez and Reverend Jorge Morales.

The PACI plaintiffs include: Political Action Conference of Illinois ("PACI"), Clifford Kelley, Lawrence Bloom, Martin Oberman and Renault Robinson.

The Pillman plaintiffs include: Stanley Pillman, Mamie Govea, Sereta Deal, Nancy Igoe and Dr. William McNabb. Their case was settled and was the subject of a consent decree. They did not participate in the appeal.

The United States of America intervened as a plaintiff in these consolidated cases pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h. The United States did not appeal or participate in the appeal from the district court's decision.

The defendants include: The City Council of the City of Chicago and the Board of Election Commissioners of Chicago. Defendants Jane M. Byrne, Martin R. Murphy and Thomas E. Keane were dismissed upon motion at the end of the plaintiffs' case. No appeal was taken from this order.

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CITATIONS TO OPINIONS BELOW

The above-entitled case was originally brought in the United States District Court for the Northern District of Illinois. The district court, the Honorable Thomas R. McMillen presiding, sitting without a jury, rendered its decision on December 21, 1982, and on December 27, 1982, the district court approved a redistricting plan for the City of Chicago pursuant to court order. On May 12, 1983, the district court denied the plaintiffs' motion for a further evidentiary hearing and modification of the judgment and entered a Rule 58 judgment. The relevant district court's decision and orders are unreported and are included in the Appendix to this Petition. (App. 43-158). The Amended Opinion resulting from the appeal of the district court's decision to the United States Court of Appeals for the Seventh Circuit is as yet unreported and appears in the Appendix to this Petition. (App. 1-42).

JURISDICTIONAL STATEMENT

The original Opinion of the Seventh Circuit was rendered on May 17, 1984. A timely petition for rehearing was filed. On August 14, 1984, and prior to ruling on the petition for rehearing, the panel withdrew its original Opinion and issued an Amended Opinion. The petition for rehearing was subsequently denied on September 10, 1984. This Petition for Writ of Certiorari was filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved in this petition is Section 2 of the Voting Rights Act of 1965, as amended on June 29, 1982, by Pub. L. No. 97-205, §3, 96 Stat. 134 (1982), 42 U.S.C. §1973 (1982) (hereafter at times "Section 2, as amended"). The full text of the statute appears in the Appendix to this Petition. (App. 163).

STATEMENT OF THE CASE

This appeal concerns the redistricting of the 50 wards within the City of Chicago following the 1980 census. These actions, consolidated for consideration, were filed one day after the effective date of Section 2, as amended, and sought to contest the 1981 Chicago ward redistricting plan approved and adopted by the defendant City Council on November 30, 1981 (the "Council plan"). The plaintiffs, groups of black (Ketchum) and Hispanic (Velasco) voters, and a black political organization (Political Action Conference of Illinois) and four individuals, alleged, *inter alia*, that the Council plan violated Section 2, as amended.

Following consolidation of the plaintiffs' cases, the United States of America and a group of five voters from the 42nd and 43rd Wards (Pillman) were allowed to intervene as plaintiffs in the consolidated cases. This cause was tried before the Honorable Thomas R. McMillen of the District Court for the Northern District of Illinois between October 19, 1982, and December 27, 1982, and consists of a Record in excess of 4,000 pages of transcript and 400 exhibits. Defendants Jane M. Byrne, Thomas E.

Keane and Martin Murphy were dismissed by the district court at the close of the plaintiffs' case. No appeal was taken from their dismissal. Before the trial was completed, the Pillman intervenors and the defendant City Council reached a settlement agreement and a consent order was entered by Judge McMillen on December 27, 1982.

According to the 1980 census figures, Chicago has a total population of 3,005,072, 43.2% of which is non-Hispanic white population, 39.8% of which is black population, and 14.0% of which is Hispanic population. The parties stipulated that 49.8% of the City's voting age population is non-Hispanic white, 35.5% is black, and 11.7% is Hispanic.

The data base used in the case to evaluate the Council plan for the City of Chicago was "one of the most extensive data bases ever developed." (Brace, Tr. 3651). The data base was composed of not only the census information from the United States Census Bureau, but also the application of this information to the voting experience of the population as reflected in the official election returns for a number of years from the Chicago Board of Elections, even returns subsequent to the promulgation of the Council's plan. (Brace, Tr. 3651-55; Def. Exs. 34A to 34T, and 35A to 35TT). This highly sophisticated data base allowed the experts to determine population movement and changes in voting patterns for each precinct in the City of Chicago. (Brace, Tr. 3653-57).

From this data base, defendant's expert, Kimball Brace, compiled statistics, as opposed to assumptions, of voting age population, voter registration and voter turnout for white, black and Hispanic groups for elections from 1975 to 1982. (Brace, Tr. 3654, 3705-10; Def. Exs. 220, 221, 236-248, 251). Mr. Brace testified that the registration and turnout rates of voters in Chicago increased significantly

in recent elections. For example, in the 1982 gubernatorial election, blacks in the City of Chicago comprised 41.4% of the City's registered voters and 39.0% of the City's turnout as compared to constituting 39.8% of the City's total population and 35.5% of the City's voting age population. Indeed, in the 1982 gubernatorial election, 85.9% of the black voting age population was registered as compared to 77.8% of the white voting age population being registered. In that same election, 56.1% of the black voting age population turned out to vote, as opposed to 56.8% of the white voting age population. (Def. Exs. 221, 248).

Defendant's expert, Dr. Thomas M. Guterbock, testified that high levels of political organization and the formation of effective coalitions produced higher percentages of minority voter registration and turnout, particularly among low income black citizens. (Guterbock, Tr. 2535-36, 2538-39). Dr. Guterbock's testimony with respect to increased participation of low income blacks resulting from effective organization and the strength of the candidate was confirmed by plaintiffs' expert, Michael Preston. (Preston, Tr. 1656-57, 1675-77). Mr. Brace's studies confirmed Dr. Guterbock's computation and analyses that higher voter registration and turnout rates correlated with effective ward organization among black and Hispanic voters. (Brace, Tr. 3710-12; Def. Exs. 210, 220, 251). Mr. Brace's analysis highlighted areas where effective ward organization resulted in a surge of registered, practicing voters, particularly in the 31st Ward, which is predominantly Hispanic. (Brace, Tr. 3712). Indeed, Defendant's Exhibit 220 reveals that those Hispanics who are registered turn out at rates comparable to, and in some instances superior to, the turnout rate for both blacks and whites. In the 1982 gubernatorial election, Hispanics comprised 6.0% of the City's registered voters and 5.6% of the City's turnout. (Def. Ex. 220).

On December 21, 1982, the district court determined that the Council's redistricting plan violated Section 2 of the Voting Rights Act, as amended. The district court ordered the City Council to provide relief in the southwest, west, and northwest areas of the City consistent with its oral decision so as to provide 19 black majority voting age population wards and 4 Hispanic majority voting age population wards. In determining the percentage threshold at which the protected minority has the same opportunity as others within the ward to participate in the electoral process and to elect a candidate of their choice, the district court rejected the so-called "65% total population guideline," based upon the evidence presented at trial, and instead set a 50% majority voting age population as the benchmark for this case, expressly finding:

> [T]here is no statistical or objective evidence in the record that a minority is entitled to or should have more than a majority of the voting age population in order to have a reasonably fair opportunity to . . . elect candidates of their choice.
>
> . . . .
>
> The figures which . . . one of defendants' expert witnesses put into the record were quite revealing and satisfies me that when the opportunity arises or when the incentive is presented, it is not necessary for a minority to have more than 50 percent to control a ward . . . .
>
> The turnout in the 1982 election and various other turnout figures and registration figures indicate it is a question of political education and incentives and organization to permit or facilitate the control of a ward by any particular minority . . . . The evidence that the defendants presented satisfies me it (the "65% guideline") is not a universally accurate or reliable figure; that blacks and Hispanics will turn out in sufficiently large numbers to control an election if they have the candidate and if they have the incentive to vote and if they have the organization. (App. 63-64).

On December 27, 1982, the district court approved a redistricting plan which provided for 19 wards with more than a 50% majority black voting age population and 4 wards with more than a 50% majority Hispanic voting age population.

Plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit from the relief afforded them by the court-approved plan. The United States of America, by and through the Justice Department, while a plaintiff-intervenor which participated actively before the district court, chose not to appeal the district court's relief.

The United States Court of Appeals for the Seventh Circuit in an Amended Opinion* issued on August 14, 1984, and authored by Circuit Judge Richard D. Cudahy, relying heavily on his prior Opinions in *Rybicki v. State Board of Elections*, 574 F. Supp. 1082 and 1147 (N.D. Ill. 1983), a three-judge court proceeding concerning legislative redistricting in the State of Illinois, reversed the district court's relief as provided in the court-approved plan and remanded this case to the district court to fashion a suitable remedy with respect to two wards and "possibly" a third, all of which have in excess of 50% black majority voting age population, in order to create "effective" black majorities in at least 19 wards, and to determine whether "effective" majorities of Hispanics can be "created" in 4 wards, notwithstanding the fact that the

* The original panel opinion in this case, in which Circuit Judge Harlington Wood, Jr., specially concurred, was issued on May 17, 1984, and was subsequently withdrawn. The original opinion implemented the so-called "65% guideline" as a legal standard, *unless persuasively rejected by the evidence*, and was withdrawn after the filing of the petition for rehearing. Circuit Judge Harlington Wood, Jr., concurred fully with the Amended Opinion and withdrew his special concurrence to the original Opinion. The Honorable Robert J. Kelleher, Senior District Judge for the Central District of California, was sitting by designation.

district court's plan creates 4 such wards with 50% or more Hispanic voting age population. The court called for additional evidence in the form of statistical and other type of data to formulate the "corrective" in providing for "*effective* majorities." (Emphasis in original). (App. 28-30, 32). The Seventh Circuit's Amended Opinion held that the district court had abused its discretion in rejecting the use of "super-majorities" to define some of these minority wards, stating:

> We believe that the district court's failure to consider carefully all of the factors which are present here as in comparable situations and which have led *other courts to employ such a corrective (frequently 65% of total population or 60% of voting age population or some variation of these guidelines) was an abuse of discretion* under the particular circumstances before us. We see nothing in the findings of the district court or in the record on appeal which adequately addresses *the widely accepted understanding . . . that minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice. . . .*
>
> The *experience of many redistricting plans has lent weight to the understanding that some form of corrective, even beyond the use of voting age population statistics, should be employed as a guideline in defining a minority district.* (App. 29-30). [Emphasis added.]

The Seventh Circuit's opinion set forth certain guidelines to be followed by the district court on remand:

> First, the retrogression in the number of wards in which blacks have a reasonable opportunity to elect a candidate of their choice should be eliminated by establishing an effective black majority in at least nineteen wards. The district court should determine, in its discretion, whether it is possible to create four

wards with an effective majority of Hispanics. Second, the district court must seriously consider the factors underlying the formation and definition of an effective majority in the black and Hispanic wards. To do so, additional evidence—primarily statistical but including other types of data—may be required, which the district court must then evaluate for reliability and significance. Depending on the district court's evaluation of these data, it may decide to adopt a corrective based directly on these statistics or some other uniform corrective such as the widely accepted 65% guideline. The use of a corrective should not be rejected for reasons which fail to take account of the electoral facts and the need to provide *effective* majorities. Failure to consider these factors fully is to leave the violation of voting rights essentially unremedied. Where voting age population statistics are available and found by the district court to be reliable these may also be used in place of total population statistics. (App. 41-42). [Emphasis in original.]

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This petition presents several important issues under the recent amendment to Section 2 of the Voting Rights Act which require resolution by this Court. The decision below is not only inconsistent with prior decisions of this Court and in direct contravention of the expressed intent of Congress, but also reflects an attitude by the circuit court toward the " 'intensely local appraisal of the design and impact' of a challenged voting system" [*White v. Regester*, 412 U.S. 755, 769 (1973)] by the district court which does violence to Rule 52 and prior redistricting jurisprudence.

It is defendant's belief that the Questions Presented For Review by this Petition require and deserve review and comment by this Court in order to give a proper interpretation to the statute and thereby set forth certain guidelines for the lower courts in applying the statute. The principal problem with the Amended Opinion, from petitioner's view, is that the Court has rewritten the statute to advance a purpose never intended by Congress, *i.e.*, the use of redistricting to maximize minority strength within a legislative unit, as opposed to the *express* intent of Congress, *i.e.*, to provide members of the protected class with the same *opportunity* as others to participate in the electoral process and to elect a representative of their choice. Moreover, the Amended Opinion refers continually to a "widely accepted 65% guideline" which has never been "accepted" by this Court or any other court of review as a "national" standard. In any event, the difficulty with any such "national" standard is that it ignores the "totality of the circumstances" standard required by the statute, which includes careful consideration of the local environment. Finally, the Amended Opinion remanded this matter to consider establishing at least 19 wards with an "effective" black majority and 4 wards with an "effective" majority of Hispanics, notwithstanding the fact that the court-approved plan creates 19 wards with more than a 50% black voting age majority and 4 wards with more than a 50% Hispanic voting age majority. The disagreement therefore centers on the "fine-tuning" of a court-approved plan or just how much minority population in a legislative unit was contemplated by Congress to satisfy the statute. This Court should exercise its supervisory jurisdiction and give lower courts direction in this significantly important area of increasing federal jurisprudence.

I.

THE SEVENTH CIRCUIT'S AMENDED OPINION IMPROPERLY REVIEWED AND REJECTED THE DISTRICT COURT'S FINDING THAT, BASED UPON THE EXTENSIVE EVIDENCE PRESENTED, IN THE CITY OF CHICAGO THE PROTECTED MINORITY NEED ONLY CONSTITUTE 50% OF AN INDIVIDUAL WARD'S VOTING AGE POPULATION IN ORDER TO CONSTITUTE AN "EFFECTIVE" MAJORITY WITHIN THAT WARD.

The Seventh Circuit remanded this matter to the district court to consider establishing at least 19 wards with an "effective" black majority and 4 wards with an "effective" majority of Hispanics. The district court's approved plan creates 19 wards with more than a 50% black voting age majority and 4 wards with more than a 50% Hispanic voting age majority. The district court expressly found that there is "no statistical or objective evidence in the record that a minority is entitled to or should have more than a majority of the voting age population in order to have a reasonably fair opportunity to . . . elect candidates of their choice" and, further, that the "figures which . . . one of the defendants' expert witnesses put into the record were quite revealing and satisfies me that when the opportunity arises or when the incentive is presented, it is not necessary for a minority to have more than 50 percent [voting age population] to control a ward." (App. 63-64).

In support of its contrary conclusion, the Seventh Circuit inexplicably cites *national* 1980 census statistics that minority groups tend to have a younger-than-average population, and generally have lower voter registration and turnout characteristics. (App. 30, n.16). The immediate answer to *any* discrepancy in age of the minority population is that the district court considered *only* the census population figures for the City of Chicago, and even more specifically, the evidence relating to what was happening in terms of regis-

tration and turnout in the respective minority wards. Parenthetically, it should be noted that the parties *stipulated* to the voting age population figures for the different groups. The Seventh Circuit, while citing national census figures, apparently failed entirely to consider defendant's exhibits which revealed that in the 1982 gubernatorial election, *85.9%* of the black voting age population in the City of Chicago was registered as compared to *77.8%* of the white voting age population being registered. In that same election, 56.1% of the black voting age population turned out to vote, as opposed to 56.8% of the white voting age population. And if there has been a change subsequently, it has been toward the strengthening of minority registration and turnout in the City.* The Seventh Circuit also apparently failed to consider Defendant's Exhibit 220 which reveals that those Hispanics who are registered turn out at rates comparable to, *and in some instances superior to,* the rate for *both blacks and whites.*

The district court, in specifically rejecting the so-called 65% guideline, found that the "turnout in the 1982 election and various other turnout figures and registration figures indicate it is a question of political education and incentive and organization to permit or facilitate the control of a ward by any particular minority" and, further, that the 65% guideline "is not a universally accurate or reliable figure; that blacks and Hispanics will turn out in

* The Seventh Circuit recognized in its Amended Opinion that the Rev. Jesse Jackson's 1984 presidential candidacy has apparently stimulated black registration and turnout nationally and that the 1983 Chicago mayoral election, wherein a black was elected mayor, indicated a marked increase in black registration and turnout. (App. 36-37, n.21). Indeed, a recent Gallup poll indicates that the percentage of black registration *equals* that of white registration on a *national* level, let alone the experience of the City of Chicago cited above. See *The Gallup Report*, May, 1984, Report No. 224, p. 9.

sufficiently large numbers to control an election if they have the candidate and if they have the incentive to vote and if they have the organization." It bears repeating here, as outlined in the Statement of the Case, that defendant's expert, Dr. Thomas M. Guterbock, testified that high levels of political organization and the formation of effective coalitions produced higher percentages of minority voter registration and turnout, particularly among low income black citizens. (Guterbock, Tr. 2535-36, 2538-39). Dr. Guterbock's testimony with respect to increased participation of low income blacks resulting from effective organization and the strength of the candidate was echoed by plaintiffs' expert, Michael Preston. (Preston, Tr. 1656-57, 1675-77). Mr. Kimball Brace's studies confirmed Dr. Guterbock's computation and analyses that high voter registration and turnout rates correlated with effective ward organization among black and Hispanic voters. (Brace, Tr. 3710-12; Def. Exs. 210, 220, 251). His analyses highlighted areas where effective ward organization resulted in a surge of registered, practicing voters, particularly in the 31st Ward, which is predominantly Hispanic. (Brace, Tr. 3712).

The Seventh Circuit has ordered a remand of this case to the district court for consideration and evaluation of "data concerning voter registration and turn-out in the black and Hispanic communities to determine the practical need for a super-majority of the respective minority groups in order to give the minorities a reasonable and fair opportunity to elect candidates of their choice." (App. 32). However, this is precisely what has already been done before the district court wherein a Record of over 4,000 pages of transcript and 400 exhibits was established, including defendant's statistical data base which compiled statistics, as opposed to assumptions, of voting age population, voter registration and voter turnout for white,

black, and Hispanic groups for elections from 1975 to 1982. (Brace, Tr. 3654, 3705-10; Def. Exs. 220, 221, 236-248, 251).

In essence, on remand the Seventh Circuit sets the 65% guideline or "some other uniform corrective" as the legal benchmark to be overcome by the evidence, primarily statistical, on voter registration and voter turnout. In essence, the Seventh Circuit has ignored the district court's findings and substituted its own perception of what the result should be in this case. This decision by the Seventh Circuit reflects an attitude towards the " 'intensely local appraisal of the design and impact' of a challenged voting system" by the district court which does violence to Rule 52 and prior redistricting jurisprudence.

The district court's findings cannot be set aside unless *clearly erroneous*. Fed. R. Civ. P. 52(a). In applying the clearly erroneous standard to a suit challenging an electoral system, "special color" should be given Rule 52(a) under the Supreme Court's admonition that "special deference is owed the trial court's superior vantage point in making the required 'intensely local appraisal of the design and impact' of a challenged voting system. *White v. Regester*, 412 U.S. 755, 769." *Washington v. Finlay*, 664 F.2d 913, 920 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). *See also, City of Lockhart v. United States*, 460 U.S. 125, 137, 148 (1983) (Marshall, J., concurring in part and dissenting in part, and Blackmun, J., concurring in part and dissenting in part); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Rome v. United States*, 446 U.S. 156, 183 (1980); and *City of Richmond v. United States*, 442 U.S. 358, 385 (1975) (Brennan, J., with whom Douglas, J., and Marshall, J., join, dissenting).

The strictness with which the Rule 52(a) "clearly erroneous" standard is to be applied was reiterated in *Rogers, supra*, 458 U.S. at 622-23, wherein this Court stated:

> In *White v. Regester*, 412 U.S. at 769-770, we stated that we were not inclined to overturn the District Court's factual findings, "representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." *See also Columbus Board of Education v. Penrick*, 443 U.S. 449, 468 (1979) (BURGER, C.J., concurring in judgment). Our recent decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), emphasizes the deference Fed. R. Civ. Proc. 52 requires reviewing courts to give a trial court's findings of fact. "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. . . ." 456 U.S. at 287.

The Seventh Circuit's Amended Opinion not only fails to properly apply the "clearly erroneous" standard, it fails to apply the standard *at all*. The district court expressly found that there is "no statistical or objective evidence in the record that a minority is entitled to or should have more than a majority of the voting age population in order to have a reasonably fair opportunity to . . . elect candidates of their choice." (App. 63). The Seventh Circuit's Amended Opinion does not declare these findings to be clearly erroneous, but rather finds that the district court *abused its discretion* in failing to consider carefully all of the factors which have *led other courts to employ a corrective such as the 65% guideline*. The Seventh Circuit ignored the district court's findings and the extensive record herein* and, based upon its general perception, *national*

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* The extent to which the Seventh Circuit has ignored the Record in this case is exemplified by its direction that on remand the district court may use voting age population statistics in place of total population statistics where they are available and *found by the district court to be reliable. All of the parties herein, including the plaintiffs and the Department of Justice, stipulated to the voting age population statistics for the City of Chicago.*

census figures, the findings in the *Rybicki* decision, an alleged "widely accepted understanding," and the alleged experience of "other" redistricting plans, concluded that the district court's determination as to the use of voting age population statistics was an abuse of discretion. As stated by Justice Brennan in *City of Richmond v. United States*, 422 U.S. 358, 385 (1975):

> Federal Rule Civ. Proc. 52(a) compels us to accept that finding unless it can be called clearly erroneous. I find it impossible, on this record, to attach that label to the findings below, and indeed, the Court never goes so far as to do so. Nevertheless, in apparent disagreement with the manner in which conflicting evidence was weighed and resolved by the lower court, the Court remands for further evidentiary proceedings, perhaps in hopes that a re-evaluation of the evidence will produce a more acceptable result. This course of action is to me wholly inconsistent with the proper role of an appellate court operating under the strictures of Rule 52(a). (Brennan, J., with whom Douglas, J., and Marshall, J., join, dissenting).

Truer words could not be written concerning the Seventh Circuit's Amended Opinion.

II.

THE SEVENTH CIRCUIT FAILED TO CONSIDER THE *ZIMMER-WHITE* FACTORS IN REVIEWING THE DISTRICT COURT'S DECISION OR TO EVEN DISCUSS THESE FACTORS IN ITS REMEDIAL ORDER.

The standard to determine a violation of Section 2 of the Voting Rights Act, as amended, was clearly outlined by Congress in the Report of the Senate Judiciary Committee:

> New Subsection 2(b) delineates the legal analysis which the *Congress intends courts to apply* under the "results test". Specifically *the subsection codifies the*

> *test for discriminatory result laid down by the Supreme Court in White v. Regester, and the language is taken directly from that decision.* 412 U.S. 755 at 766, 769. [Footnote omitted]. *The courts are to look at the totality of the circumstances in order to determine whether the result of the challenged practice is that the political processes are equally open; that is, whether members of a protected class have the same opportunity as others to participate in the electoral process and to elect candidates of their choice.* The courts are to conduct this analysis on the basis of a variety of objective factors concerning the impact of the challenged practice and the social and political context in which it occurs.

S. Rep. 417, 97th Cong., 2d Sess., 67 (1982) [Emphasis added.]

Section 2 in essence dictates a "results" test in that it proscribes "voting standards, practices or procedures . . . which result in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . ." 42 U.S.C. § 1973(a). Subsection (b) of the amendment establishes a "totality of the circumstances" test for a violation of subsection (a). The objective factors* referred to by the legislative history were derived from *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom., East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

At trial, both parties presented evidence relevant to these objective factors, which included statistical evidence to supplant the "estimates" which purport to underlie the "65% guideline" ("5% for young population, 5% for low voter registration and 5% for low voter turnout" as noted in the

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* The factors are fully set forth in the Seventh Circuit's Amended Opinion. (App. 10-12, n.5).

Amended Opinion, App. 33). For reasons which remain unexplained, the Seventh Circuit apparently ignored thousands of pages of testimony and exhibits demonstrating compliance with the statutory objective factors, together with the statistical data base, which underlay the district court's decision, and chose instead to center on its own concept of "effective" majorities in each legislative unit. Based upon the evidence presented, the district court concluded that the city-wide retrogression in the Council plan violated the Voting Rights Act, as amended, and ordered that the remedial map contain 19 black "majority" wards and 4 Hispanic "majority" wards. Concluding that the totality of the evidence did not warrant a corrective for lower minority registration or turnout, the district court held that the "majority" requirement would be satisfied if the ward consisted of at least fifty percent voting age population of a given minority.

The Seventh Circuit, however, expressed a different view regarding the relevance of the *Zimmer-White* factors in the finding of discriminatory result and in the fashioning of a remedial order. The Seventh Circuit acknowledged its duty to apply these objective factors (App. 10) and conceded that the political position of minorities in Chicago is "obviously somewhat different from that addressed in *White v. Regester*." (App. 13). Its subsequent analysis and structuring of a remedy, however, reflected a contrary orientation. It noted:

> In a case where lines are drawn to establish discrete electoral units and to distribute racial and ethnic populations among districts, the way in which these lines are drawn may become independent indicia of discriminatory intent or result. Such "direct" factors in the drafting process of individual districts may augment *or even take the place of* the *White v. Regester* "background" factors which indicate the historical or sociological climate of an entire county or other political unit. (Emphasis supplied). (App. 13).

In its directions on remand, the Seventh Circuit adopts an inconsistent position: it relies upon decisions from the southern states to structure an appropriate remedy (*i.e.*, to find support for the 65% rule), while failing to consider the relevance that the existence or non-existence of the *Zimmer-White* factors might play in the construction of a new map.

Wholly disregarding the district court's conclusions as to the favorable political position of minorities in the City of Chicago, the Seventh Circuit instead relies upon findings set forth *in a different case* [*Rybicki v. State Board of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (three-judge panel) (also authored by Circuit Judge Cudahy).] The remedial portion of its opinion mandates construction of a remedy solely based upon statistical data, without regard to the relevance of the *Zimmer-White* factors. In fact, the court mentions these factors in the beginning of its discussion and sets forth the need to apply the factors herein, but never refers to them again.

The Seventh Circuit's remedial directive is very explicit. It defines an *effective* majority as "that share of the population required to provide minorities with a 'realistic opportunity to elect officials of their choice' ". (App. 24). To this extent, it is consistent with the dictates of the Voting Rights Act. The manner in which the Seventh Circuit directs the determination of this "share of the population" which would provide a "realistic opportunity," however, not only ignores the findings of the district court, but authorizes an extension of the court's equitable authority far beyond that contemplated by this Court in its previous decisions or by the Voting Rights Act itself.

The district court, after considering the totality of the evidence before it, concluded that the Section 2 violation

could be corrected by providing some of the minority wards with 50% minority voting age population. The Seventh Circuit reversed, concluding that, "The court-approved map does not grant to minority citizens a reasonable and fair opportunity to elect candidates of their choice as that concept has been understood in redistricting jurisprudence." (App. 27). Nowhere did the court explain how "redistricting jurisprudence" has defined the concept of "reasonable opportunity" under the statute.

The *Zimmer-White* factors were not even mentioned as relevant in the drafting of a remedy. The statistical factors, cited by the Seventh Circuit, should not be the sole factors considered in a redistricting plan, however. The question of a reasonable opportunity to elect candidates of a minority's choice involves several interrelated factors, including consideration of the social and political context in which the Section 2 violation has occurred. The *Zimmer* factors, which are critical to this determination of "reasonable opportunity," are effectively subordinated by the Seventh Circuit's decision in favor of statistical evidence.

The Seventh Circuit held that the retrogression problem would be rectified by converting the district court's configuration of 19 black wards and 4 Hispanic wards into 19 "effective" black majority wards and 4 "effective" Hispanic majority wards. With regard to voting age population statistics, the Seventh Circuit indicated that a 5% increment should be added to compensate for the lower voting age of minorities, at least until voting age population data becomes available and the district court finds that it can accept them as reliable. It noted that frequently the age differential is greater than 5%. (App. 28-29). Actually, the district court's ruling more accurately accommodates the discrepancy between voting age and the

total population than a 5% increment applied uniformly throughout the city.*

According to the Seventh Circuit, the district court's remedy was an abuse of discretion because it failed to adequately address

> the widely accepted understanding, . . . that minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice. (App. 29).

Ignoring the evidence presented on minority registration and turnout *in Chicago*, the Seventh Circuit relies on *national* statistics to assert that minorities generally have lower voter registration and turnout. (App. 30, n.16).

Ironically, the Seventh Circuit then directed the district court to consider the same type of statistical evidence which led it to conclude at the close of trial that correctives for registration and turnout were unnecessary to rectify the Section 2 violation. The Seventh Circuit acknowledged this fact; however, it articulated an additional prerequisite before the district court could base any conclusions on this data:

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* The Seventh Circuit also ignored the dual goals of any redistricting effort: compliance with both the Voting Rights Act and the constitutional mandate of one person, one vote. Any references to percentages applying the 1980 census to the 1970 map become irrelevant, as those percentages are based upon an unconstitutional ward configuration. Viewed in this light, the Seventh Circuit's assertion that "the most relevant change is one *downward* from the pre-redistricting percentage previously achieved by the minority group rather than one *upward* from the map . . . found to be in violation of the Voting Rights Act" (App. 31) lacks any credence whatsoever.

> While it would be within the district court's discretion to accept, reject or utilize such statistics [as presented by the parties at trial] in a modified form, the district court would be *required to explain and justify its reliance on such statistics and on the numbers on which they are based.* (Emphasis supplied). (App. 32, n.18).

The Seventh Circuit emphasized that this empirical data may be ambiguous, and then launched into its advocacy of the so-called 65% guideline. Thus, according to the Seventh Circuit, statistical evidence, instead of the Congressionally-mandated *Zimmer* factors, becomes the relevant inquiry in a reapportionment remedy.

III.

THE SEVENTH CIRCUIT ERRONEOUSLY REVERSED THE DISTRICT COURT'S REDISTRICTING PLAN FOR THE CITY OF CHICAGO BECAUSE THE PLAN FAIRLY REFLECTS THE POLITICAL STRENGTH OF THE MINORITY COMMUNITY AS IT EXISTS.

In *City of Port Arthur, Texas v. United States*, 459 U.S. 159 (1982), *affirming*, 517 F. Supp. 987 (D.D.C. 1981), the district court had refused to approve, under §5 of the Voting Rights Act, an electoral plan where one-third of the council seats were to be elected from black majority districts, but blacks comprised 40.56% of the population of the City and 35% of the voting age population. The majority of this Court noted that these figures evidenced the undervaluation to some extent of the political strength of the black community and, based upon this as well as other factors, determined that it could not fault the judgment of the district court in conditioning its approval of the plan, stating:

> Because reasonable minds could differ on the question [as to whether an electoral plan adequately reflected the political strength of the minority] and

> because the district court was sitting as a court of equity seeking to devise a remedy for what otherwise might be a statutory violation, we should not rush to overturn its judgment. 459 U.S. 159, 167 (1982).

In the district court's plan herein, the only differential between the percentage of black wards and the percentage of black voting age population, and the only differential between the percentage of black wards and the percentage of black population *favors the black community of the City of Chicago with overrepresentation.* This Court has recognized "a preference for voting age population statistics, see *United Jewish Organizations v. Carey,* 430 U.S. 144, 164 n.23 (1977) (opinion of WHITE, J.), because they are more 'probative' of the 'electoral potential of the minority community,' *City of Rome v. United States,* 446 U.S. 156, 186 n.22 (1980), than population statistics." *City of Port Arthur, Texas v. United States,* 459 U.S. 159, 172 n.3 (1982) (Powell, J., with whom Rehnquist, J., and O'Connor, J., join, dissenting).

Blacks comprise 35.5% of the City's total voting age population and under the district court's plan constitute a majority voting age population in 19 wards and a plurality in one ward, for a total of 20 wards or 40% of the City's wards. Blacks comprise 39.8% of the City's total population and under the district court's plan constitute a majority in 19 wards and a considerable plurality in one ward, again, for a total of 20 wards or 40% of the City's wards. In regard to the black plaintiffs, the proportional representation, indeed overrepresentation, assured by the district court's plan must, by definition, *afford the black community of Chicago representation reasonably equivalent to their political strength.* In a word, the district court's plan fairly reflects the strength of the black community as it exists in the City of Chicago. *City of Rome*

v. United States, 446 U.S. 156, 187 (1980); *City of Port Arthur, Texas v. United States*, 459 U.S. 159, 167 (1982); and *City of Richmond v. United States*, 442 U.S. 358, 371 (1975).

In discussing the district court's rejection of the alleged super-majority requisite of 65% minority population in a ward to satisfy the statute, the Seventh Circuit's Amended Opinion seizes upon a reference of the district court that a majority voting age population of a minority group should be sufficient to provide an opportunity to elect a candidate of their choice. [In the face of the statement, one would think that the statistic of 50% or more of those persons eligible to vote, as opposed to total population, within a ward on its face would provide that reasonable opportunity.] But, however one desires to debate the logic of this judgment, the appropriate test here is and remains precisely what was done by the district court in applying the "totality of circumstances" test.

Of the 19 wards with black majorities, the Seventh Circuit's Amended Opinion singles out the 7th, 15th and 37th Wards. All 16 other wards have such significant black majorities as not to necessitate discussion. All exceed 65% minority voting age population. What is important then is an examination of the statistics within these wards to determine whether the minority population within these wards have an opportunity to elect a candidate of their choice. We have stated again and again that there cannot possibly be any dispute that the opportunity is there, as the following population figures demonstrate (Def. Ex. 261I):

BLACK MAJORITY WARDS

Ward	Black	White	Hispanic
7	58.4 (58.0)*	11.3 (14.7)	30.1 (26.6)
15	60.1 (52.6)	32.4 (40.0)	6.4 (5.6)
37	61.7 (56.2)	24.0 (30.0)	11.4 (10.5)

In two of the wards (7th and 37th) the black majority voting age population is almost twice that of any other group, as well as being over 50%. In the 15th Ward, the black majority voting age population is 12.6% higher than the next group, as well as being over 50%.

Of the 4 wards with Hispanic voting age majorities, the Amended Opinion singles out the 25th, 26th, and 31st Wards. The 22nd Ward has a 69% *voting age population* and does not warrant discussion. As with the black wards discussed above, there cannot possibly be any dispute that the Hispanic population within these wards *have an opportunity to elect a candidate of their choice,* as the following population figures demonstrate (Def. Ex. 261I):

HISPANIC MAJORITY WARDS

Ward	Black	Hispanic	White
25	15.7 (15.2)	65.4 (59.5)	18.1 (24.1)
26	5.3 (4.7)	58.8 (50.0)	32.4 (41.1)
31	10.3 (8.9)	57.4 (50.6)	29.0 (36.9)

Defendant's Exhibit 220 reveals that those Hispanics who are registered turn out at rates comparable to, *and in some instances superior to,* the turnout rate *for both Blacks and whites.* Concededly, the problem with the Hispanic community is getting Hispanics registered, for Hispanics have a far lesser registration rate than *either the*

* The figures in parentheses are percentages of voting age population ("VAP"), as opposed to percentages of total population ("TP").

Black or white populations. Of course, this phenomenon is in no small part due to the fact that many Hispanics in the City of Chicago, particularly on the Southwest Side of the City, are of Mexican descent and are not American citizens. *Although included in the 1980 census population figures, these persons are not eligible to vote.* The Amended Opinion directs the district court to apply an "appropriate corrective" for "non-citizenship" of Hispanics in particular areas. The Court of Appeals cites absolutely no judicial precedent for the proposition that Hispanics are entitled to an even greater super-majority of a political unit when they are significantly made-up of non-citizens. *Certainly no decision of this Court supports that proposition,* and such a proposition has no legal justification. *See, e.g., Rybicki v. State Board of Elections,* 574 F. Supp. 1082 at 1140, n.12 (Grady, J., dissenting):

> In the case of Hispanics, the low registration may in part be due to the fact that many Hispanics are not American citizens. The majority decision, in adopting the 15 percent formula for the Hispanics, accepts the doubtful proposition that American citizens of Hispanic extraction are entitled to have their voting power enhanced because of the presence of Hispanic aliens in the community. *See Burns v. Richardson,* 384 U.S. 73, 92, 86 S.Ct. 1286, 1296, 16 L.Ed.2d 376 (1966):
>
> > Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the states are required to *include aliens,* transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. (Emphasis added).

As to the Southwest Side Hispanic wards, counsel for the Hispanic plaintiffs *accepted* the configuration of the

22nd Ward (75.6% Hispanic TP and 69.0% Hispanic VAP) as presented in the court-approved plan. (Martinez, Tr. 4146). As to the 25th Ward (*65.4%* Hispanic TP, *59.5%* Hispanic VAP as contrasted to *18.1%* white TP, *24.1%* white VAP and 15.7% Black TP, 15.2% Black VAP), there can be no legal justification under the Voting Rights Act or the Constitution for the Hispanic citizens of the 25th Ward to be given *even greater* super-charged voting power because of the existence of Hispanic non-citizens in the community of the 25th Ward. The opportunity is there.

A comparison of the population percentages for the court-approved redistricting plan with the *Hispanic plaintiffs' proposal at trial*, reveals that the Hispanic plaintiffs have essentially achieved the results they sought on the Northwest Side (Def. Exs. 16I, 62I, and 63I as compared to Def. Ex. 261I):

PL.'s ALTS. I, II, III			COURT-APPROVED PLAN		
Ward	Tot. Pop.	VAP	Ward	Tot. Pop.	VAP
26	52.5	43.9	26	58.8	50.0
30	64.8	58.4	31	57.4	50.6
31	56.5	49.4	32	46.3	38.8
32	35.0	28.8	33	48.9	42.0

These figures make clear that the Amended Opinion concerns the esoteric question of the appropriate percentage threshold at which a ward is to be considered minority controlled or substantially subject to minority influence. No decision of this Court nor the statute and its legislative history addresses this question.

The Seventh Circuit criticized the district court for failing to address the alleged "experience of many redistricting plans [which] has lent weight to the understanding that some form of corrective, even beyond the use of voting age population statistics, should be employed as a guideline in defining a minority district." (App. 29). However, no decision of this Court has endorsed or even indicated such an "understanding," especially where voter

registration and voter turnout approaches that for whites. Clearly, the 65% rule does not apply to a situation where registration and turnout rates approach the rates of white voters. Motormura, *Preclearance Under Section Five Of The Voting Rights Act*, 61 N.C.L. Rev. 189, 234 (1983). *This Court* indeed appears to have endorsed a contrary view in *City of Port Arthur, Texas v. United States*, 459 U.S. 159 (1982), *affirming*, 517 F. Supp. 987, 1016 n.160 (D.D.C. 1981), where the district court had found that black voters could elect a candidate of their choice in a district with a population of 61.1% black and a voting age population of approximately 55% black.

In those cases adjudicated under Section 5 of the Voting Rights Act, wherein the 65% figure might be expected to have some *de jure* significance, *this Court* has itself upheld a redistricting plan where the minority districts did not reach the 65% levels, *but merely established majority levels of population. Beer v. United States*, 425 U.S. 130 (1976). In *Beer*, the two black majority districts which the majority upheld as adequate were Districts "B" and "E" which respectively had black populations of 64.1% and 50.6%. Only District B had a black majority of registered voters, barely (52.6%), while the other district had only 43.2% black voter registration. 425 U.S. at 151, n.7. The majority stated that under such circumstances, "there is every reason to predict, . . ., that at least one and perhaps two Negroes may well be elected to the council." 425 U.S. 130, 142.

In support of its position, the Seventh Circuit cites *this Court's* "specific approval" of the 65% guideline in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) ("*UJO*"). A careful reading of that case, however, reveals that this Court neither upheld nor disputed that benchmark, and did not discuss its vitality or whether it was an appropriate measure of anything.

In *UJO*, the Attorney General indicated that a *non-white* population of 65% was necessary to create a minority seat. This Court simply noted that it was not necessary to review the propriety of the Justice Department's position in that regard. Parenthetically, it should be noted that the three black wards criticized by the Seventh Circuit contain *66.5% non-white population* in the 15th Ward, *73.1% non-white* population in the 37th Ward, and *88.5% non-white population* in the 7th Ward.

We stress again that the statute calls for an opportunity of a protected minority to elect a candidate of its choice, not an "effective" majority, or a "guarantee," or a maximization of strength as the Amended Opinion seems to dictate. Indeed, the statute expressly states that "nothing in this section establishes a *right* to have members of a protected class *elected* in numbers equal to their proportion in the population." 42 U.S.C. §1973 (1982). The strength of the black and Hispanic population in the wards in question, as opposed to the white population, voting age or otherwise, is simply not debatable. The words of the Honorable John Grady during the trial of *Rybicki v. State Board of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982), ring true here:

> The opportunity is there. It is a matter of shoe leather and doorbell ringing and organization and effort and hard work. (Tr. 567).

CONCLUSION

Petitioner respectfully submits that every conceivable reason exists for this decision to be accepted for review. An enormous effort was made by the parties and the district court to comply with the directions of Congress in the redistricting process, including exacting adherence to the *Zimmer-White* objective factors. The most sophisticated data base ever assembled was generated to test the propriety of the "super-majority" requirement for minority wards within the City of Chicago, establishing that in Chicago, it was not needed. Based upon all this evidence, including the experience of minority registration, turnout and population age in Chicago, the district court applied its remedy creating 19 black voting age majority wards and 4 Hispanic voting age majority wards. Apparently ignoring all of this evidence, the Seventh Circuit reversed the district court's decision and remanded the cause to create the same number of minority wards, based upon its own concept of "effective" wards and not that of Congress.

If this is to be the law, this Court should state it. Otherwise, there will be no direction to district courts engaged in this "political thicket."

Respectfully submitted,

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